

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ROBERTO ANTONIO BALLARD,

Petitioner,

vs.

MATTHEW CATE, et al.,

Respondents.

Civil No. 09cv0957-IEG (CAB)

REPORT AND RECOMMENDATION RE:

(1) DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS; and

(2) DENIAL OF REQUEST FOR EVIDENTIARY HEARING

I. INTRODUCTION

Roberto Antonio Ballard, a state prisoner proceeding pro se, has filed a Petition for Writ of Habeas Corpus (“Pet.”) pursuant to 28 U.S.C. § 2254 challenging his San Diego County Superior Court conviction in case number SCE247764 for one count of assault on a child with force likely to produce great bodily injury resulting in death and one count of involuntary manslaughter. (Lodgment No. 1, vol. 2 at 0284-85.) Ballard claims his federal constitutional rights were violated for the following reasons: (1) the jury was not properly instructed on all elements of the crimes; (2) his right to a speedy trial was violated; (3) his due process rights to a fair trial were violated when he was shackled during the trial; and (4) his right to a fair trial was violated when the state court ignored exculpatory evidence. (Pet. at 6-9; Mem. P. & A. Supp. Pet. at 10-21.) Ballard also asks for an evidentiary hearing on claim four. (Mem. P. & A. Supp. Pet. at 21.) Respondent contends the claims are procedurally defaulted, and, in any event, fail on the merits. (Answer at 2-6; Mem. P. & A. Supp. Answer at 1-19.)

1 The Court has considered the Petition, Respondent's Answer and Memorandum of Points and
 2 Authorities in Support of the Answer, the Lodgments submitted by Respondent, Petitioners' Traverse,
 3 and all the supporting documents submitted by the parties. Based upon the documents and evidence
 4 presented in this case, and for the reasons set forth below, the Court recommends that the Petition and
 5 the request for an evidentiary hearing be **DENIED**.

6 **II. FACTUAL BACKGROUND**

7 This Court gives deference to state court findings of fact and presumes them to be correct.
 8 Petitioner may rebut the presumption of correctness, but only by clear and convincing evidence. 28
 9 U.S.C.A. § 2254(e)(1)(West 2006); *see also Parke v. Raley*, 506 U.S. 20, 35-36 (1992) (holding findings
 10 of historical fact, including inferences properly drawn from these facts, are entitled to statutory
 11 presumption of correctness). The facts as found by the state appellate court are as follows¹:

12 A. The People's Case

13 Ballard lived with his girlfriend, Isabel De Leon (Isabel); [footnote 3] Isabel's
 14 16-year-old brother, Jose De Leon (Jose); and Isabel's three children, Cesar, Estella, and
 Angel, who was 16 months old.

15 FN3. The use of first names is solely for purposes of clarity.

16 In the morning on the day Angel died, Isabel did not notice any bruises on Angel's
 17 body when she gave him a bath. Isabel went to work and left her children with Ballard
 18 and Jose. Jose testified that Ballard was inside with the three children while Jose was
 cutting the grass in front of their home. Cesar testified that he woke to sounds indicating
 someone was being hit, Angel was crying, and Ballard was speaking in an angry tone.
 From his position outside, Jose observed Ballard leave the home.

19 Ballard took Angel to the hospital and identified himself to staff as the father.
 20 Ballard told Dr. Herrera, a pediatric resident, that Angel had fallen off the kitchen table,
 21 and Ballard decided to bring him to the hospital. Isabel testified that Ballard called her
 at work, he sounded desperate, and he wanted to know Angel's birthday and medical
 history. Ballard again telephoned Isabel and told her to come to the hospital because
 Angel was there. When Isabel arrived at the hospital she found Angel in the ICU, and
 Ballard was not in the hospital. Angel was brain dead and later died of blunt force head
 injuries.

22 Dr. Christina Stanley, the chief deputy medical examiner for the County of San
 23 Diego, performed Angel's autopsy. Dr. Stanley noted that Angel had numerous bruises
 and abrasions on his head, forehead, ear, cheek, arm, back, abdomen, thigh, knee, and
 shin. Angel also had a complex skull fracture and a broken humerus bone. Dr. Stanley
 identified multiple areas of force impact on Angel's head, back, abdomen, knees and
 lower legs. She believed that the injuries to Angel's face could have been caused by a

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 28 ¹ The Court of Appeal opinion, lodged as Lodgment No. 6, is missing pages 2 and 4. Thus, the facts
 are taken from *People v. Ballard*, 2007 WL 1600386, slip op. (Cal. Ct. App. 2007) instead of Lodgment No. 6

1 person forcibly striking Angel with his hand and that the complex skull fracture was
 2 inconsistent with a fall. Dr. Sandra Murray, a pediatrician with additional training in
 3 family violence, testified that the fracture in Angel's humerus bone and the bruising on
 4 both sides of his face were inconsistent with a fall.

5 B. The Defense Case

6 Ballard did not present any evidence at trial.

7 (*People v. Ballard*, 2007 WL 1600386, slip op. (Cal. Ct. App. 2007) at *1.)

8 **III. PROCEDURAL BACKGROUND**

9 On February 16, 2005, the San Diego County District Attorney's Office charged Roberto Antonio
 10 Ballard with one count of assault on a child by means of force likely to produce great bodily injury
 11 resulting in death, in violation of California Penal Code ("Penal Code") section 273ab, and one count
 12 of murder, in violation of Penal Code section 187(a). (Lodgment No. 1, vol. 1 at 0001-02.) The
 13 Information also alleged that Ballard had suffered a prior conviction for which he served a separate
 14 prison term, within the meaning of Penal Code sections 667.5(b) and 668. (*Id.*)

15 Following a jury trial, Ballard was convicted of the assault on a child charge and convicted of
 16 the lesser included offense of involuntary manslaughter on the murder charge. (*Id.* at 0284-85.) Ballard
 17 admitted suffering the prior conviction as alleged at a subsequent hearing. (Lodgment No. 2, vol. 11 at
 18 1501-06.)

19 Ballard appealed to the California Court of Appeal for the Fourth Appellate District, Division
 20 One, which affirmed the conviction and sentence in an unpublished opinion filed June 5, 2007.
 21 (Lodgment Nos. 3, 4, 5, 6.) Ballard filed a Petition for Review in the California Supreme Court, which
 22 that court denied without citation of authority on August 8, 2007. (Lodgment Nos. 7, 8.)

23 Thereafter, Ballard filed a petition for writ of habeas corpus in the San Diego Superior Court.
 24 (Lodgment No. 9.) That court denied the petition in a written, unpublished opinion on December 6,
 25 2007. (Lodgment No. 10.) Ballard then filed a petition for writ of habeas corpus in the California Court
 26 of Appeal for the Fourth Appellate District, Division One, which denied the petition in a written,
 27 unpublished opinion filed on May 9, 2008. (Lodgment Nos. 11, 12.) Finally, Ballard filed a petition for
 28 writ of habeas corpus in the California Supreme Court. (Lodgment No. 13.) The court denied the
 29 petition on December 10, 2008, citing *In re Dixon*, 41 Cal. 2d 756 (1953). (Lodgment No. 14.)

1 Ballard filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in this Court on
 2 May 4, 2009, with a Memorandum of Points and Authorities in Support of the Petition. (Doc. No. 1.)
 3 Respondent filed an Answer and Memorandum of Points and Authorities in Support of the Answer on
 4 September 10, 2009. (Doc. No. 11.) Ballard filed a Traverse on November 13, 2009. (Doc. No. 17.)

5 **IV. DISCUSSION**

6 **A. Scope of Review**

7 Title 28, United States Code, § 2254(a), sets forth the following scope of review for federal
 8 habeas corpus claims:

9 The Supreme Court, a Justice thereof, a circuit judge, or a district court shall
 10 entertain an application for a writ of habeas corpus in behalf of a person in custody
 11 pursuant to the judgment of a State court only on the ground that he is in custody in
 12 violation of the Constitution or laws or treaties of the United States.

13 28 U.S.C. § 2254(a) (West 2006) (emphasis added). As amended, 28 U.S.C. § 2254(d) reads:

14 (d) An application for a writ of habeas corpus on behalf of a person in custody
 15 pursuant to the judgment of a State court shall not be granted with respect to any
 16 claim that was adjudicated on the merits in State court proceedings unless the
 17 adjudication of the claim –

18 (1) resulted in a decision that was contrary to, or involved an
 19 unreasonable application of, clearly established Federal law, as
 20 determined by the Supreme Court of the United States; or

21 (2) resulted in a decision that was based on an unreasonable
 22 determination of the facts in light of the evidence presented in the State
 23 court proceeding.

24 28 U.S.C. § 2254(d)(1)-(2) (West 2006) (emphasis added).

25 “[The Anti Terrorism and Effective Death Penalty Act] establishes a ‘highly deferential standard
 26 for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the
 27 doubt.’” *Womack v. Del Papa*, 497 F.3d 998, 1001 (9th Cir. 2007) (quoting *Woodford v. Viscotti*, 537
 28 U.S. 19, 24 (2002)). To obtain federal habeas relief, Ballard must satisfy either § 2254(d)(1) or
 § 2254(d)(2). *See Williams v. Taylor*, 529 U.S. 362, 403 (2000). The Supreme Court interprets
 § 2254(d)(1) as follows:

29 Under the “contrary to” clause, a federal habeas court may grant the writ if the state court
 30 arrives at a conclusion opposite to that reached by this Court on a question of law or if
 31 the state court decides a case differently than this Court has on a set of materially
 32 indistinguishable facts. Under the “unreasonable application” clause, a federal habeas
 33 court may grant the writ if the state court identifies the correct governing legal principle
 34 from this Court’s decisions but unreasonably applies that principle to the facts of the

1 || prisoner's case.

² *Id.* at 412-13; see also *Lockyer v. Andrade*, 538 U.S. 63, 73-74 (2003).

3 Where there is no reasoned decision from the state’s highest court, the Court “looks through” to
4 the underlying appellate court decision. *Ylst v. Nunnemaker*, 501 U.S. 797, 801-06 (1991). If the
5 dispositive state court order does not “furnish a basis for its reasoning,” federal habeas courts must
6 conduct an independent review of the record to determine whether the state court’s decision is contrary
7 to, or an unreasonable application of, clearly established Supreme Court law. *See Delgado v. Lewis*, 223
8 F.3d 976, 982 (9th Cir. 2000) (overruled on other grounds by *Lockyer*, 538 U.S. at 75-76); *accord Himes*
9 *v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003). A state court, however, need not cite Supreme Court
10 precedent when resolving a habeas corpus claim. *Early v. Packer*, 537 U.S. 3, 8 (2002). “[S]o long as
11 neither the reasoning nor the result of the state-court decision contradicts [Supreme Court precedent],”
12 *id.*, the state court decision will not be “contrary to” clearly established federal law. *Id.*

B. Analysis

14 Ballard alleges four claims in his petition. First, he claims the state court failed to instruct the
15 jury on all elements of the offense when it refused to define the term “conscious disregard for life” after
16 the jury sent a note out during deliberations asking for the term to be defined. (Pet. at 6; Mem. of P. &
17 A. Supp. Pet at 10-11.) Second, he argues there was sufficient delay in bringing him to trial such that
18 his federal due process right to a speedy trial was violated. (Pet. at 7; Mem. of P. & A. Supp. Pet. at 15.)
19 Third, he claims that he was shackled in full view of the jury and without any judicial finding that such
20 shackling was necessary, in violation of his federal due process rights to a fair trial. (Pet. at 8; Mem. of
21 P. & A. Supp. Pet at 16-20.) Fourth, he argues that evidence establishing he is actually innocent of the
22 charges was withheld by the prosecutor. He further claims the trial court judge refused to acknowledge
23 this and other evidence presented at trial establishes his innocence. He also asks the Court to conduct
24 an evidentiary hearing on this claim. (Pet. at 9; Mem. of P. & A. Supp. Pet. at 12-14, 16-27.)

25 Respondent contends claims one, two and four are procedurally defaulted because Ballard last
26 raised these claims in a habeas corpus petition he filed in the California Supreme Court. That court
27 denied the claims citing *Dixon* which Respondent contends is an adequate and independent state
28 procedural bar. (Answer at 6; Mem. P. & A. Supp. Answer at 1-5.) Respondent also contends claim

1 three is procedurally barred because the state appellate court denied the claim on procedural grounds.
 2 (Answer at 6.) In the alternative, Respondent argues the state court's adjudication of Ballard's claims
 3 was neither contrary to, nor an unreasonable application of, clearly established Supreme Court law and
 4 that he is not entitled to an evidentiary hearing on claim four. (Mem. of P. & A. in Supp. of Answer at
 5 5-26.)

6 1. *Procedural Default*

7 Respondent contends claims one, two and four are procedurally defaulted because Ballard last
 8 raised them in the habeas corpus petition he filed in the California Supreme Court which denied them
 9 with a citation to *Dixon*. (See Lodgment Nos. 13, 14.) The Ninth Circuit has held that because
 10 procedural default is an affirmative defense, Respondent must first have "adequately pled the existence
 11 of an independent and adequate state procedural ground . . ." *Bennett v. Mueller*, 322 F.3d 573, 586
 12 (9th Cir. 2003). In order to place the defense at issue, Ballard must then "assert[] specific factual
 13 allegations that demonstrate the inadequacy of the state procedure . . ." *Id.* The "ultimate burden" of
 14 proving procedural default, however, belongs to the state. *Id.* If the state meets its burden under *Bennett*,
 15 federal review of the claim is foreclosed unless Ballard can "demonstrate cause for the default and actual
 16 prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the
 17 claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750
 18 (1991).

19 a. *Independence*

20 In 1998, the California Supreme Court declared that it would no longer consider federal law
 21 when denying a habeas claim as procedurally defaulted. *In re Robbins*, 18 Cal. 4th at 770, 811-12
 22 (1998). Although the Ninth Circuit has not specifically determined whether a post-*Robbins* application
 23 of the *Dixon* rule is independent of federal law, the Ninth Circuit has generally stated, "[t]he California
 24 Supreme Court has adopted in *Robbins* a stance from which it will now decline to consider federal law
 25 when deciding whether claims are procedurally defaulted." *Park v. California*, 202 F.3d 1146, 1152 (9th
 26 Cir. 2000). Moreover, although *Bennett* concerned only California's untimeliness bar as stated in *In re*
 27 *Clark*, 5 Cal. 4th 750 (1993), the analysis in that case compels the same result for claims barred pursuant
 28 to the rule established by *Dixon*. The pre-*Robbins* application of the two procedural bars was similar

1 in that the invocation of either *Dixon* or *Clark* required the state court to determine if there existed
 2 fundamental constitutional error that would excuse the petitioner's default, and such an analysis
 3 necessarily involved the consideration of federal law. *Bennett*, 322 F.3d at 581-82; *see also LaCrosse*
 4 *v. Kernan*, 244 F.3d 702, 707 (9th Cir. 2001) (observing that consideration of federal law in barring
 5 claims as pretermitted is "analogous" to consideration of federal law in barring claims as untimely).
 6 Furthermore, in *Protsman v. Pliler*, 318 F. Supp. 2d 1004, 1007-08 (S.D. Cal. 2004), the court found a
 7 post-*Robbins* application of *Dixon* to be independent of federal law, and this Court agrees with that
 8 conclusion. The California Supreme Court denied Ballard's habeas corpus petition with a citation to
 9 *Dixon* on December 10, 2008, well after the decision in *Robbins*. Accordingly, Respondent has met his
 10 initial burden under *Bennett* to establish that *Dixon* is an independent state procedural bar. *Bennett*, 322
 11 F.3d at 586. Moreover, because Ballard only challenges the adequacy of *Dixon* in his Traverse, the court
 12 also concludes Respondent has met his ultimate burden under *Bennett* with regard to independence as
 13 well. *Id.*

14 b. *Adequacy*

15 The analysis with regard to adequacy is more complex. Citing *Bennett*, Respondent contends
 16 that "Ballard has not demonstrated the inadequacy of the state proceedings which barred his habeas
 17 petitions for failure to assert the claim on direct appeal." (Mem. P. & A. Supp. Answer at 4.) This
 18 satisfies Respondent's initial burden under *Bennett*. 322 F.3d at 586. Ballard must therefore satisfy his
 19 "modest" interim burden by asserting the inadequacy of *Dixon* with particularity. *Bennett*, 322 F.3d at
 20 586. In his traverse, Ballard contends the *Dixon* rule has not been consistently applied and cites *Dennis*
 21 *v. Brown*, 361 F. Supp. 2d 1124 (N.D. Cal. 2005), *Carpenter v. Ayers*, 548 F. Supp. 2d 736 (N.D. Cal.
 22 2008) and *In re Crocket*, 159 Cal. App. 4th 751 (2008) as support for this contention. (Traverse at 9-10.)
 23 *Dennis* and *Carpenter* are capital cases which conclude *Dixon* was not consistently applied between
 24 1993 and 2003. *See Dennis*, 361 F. Supp. 2d at 1130-31. The relevant time for the purported default
 25 in Ballard's case was 2006, when he filed his direct appeal. *See Fields v. Calderon*, 125 F.3d 757, 760-
 26 61 (9th Cir. 1997).

27 The Court need not decide whether Ballard's efforts satisfy his interim burden, however, because
 28 the Ninth Circuit has stated that where deciding the merits of a claim proves to be less complicated and

1 less time-consuming than adjudicating the issue of procedural default, a court may exercise discretion
 2 in its management of the case to reject the claims on their merits and forgo an analysis of cause and
 3 prejudice. *See Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th Cir. 1998). Accordingly, the Court will
 4 address the merits of Ballard's claims. Because the state supreme court denied these claims on
 5 procedural grounds and did not issue a reasoned opinion on the claim, this Court must conduct a *de novo*
 6 review of this claim. *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002).

7 2. *Instructional Error (Claim One)*

8 In claim one, Ballard alleges the jury was not properly instructed because when it asked for a
 9 definition of the term "conscious disregard for human life," the trial judge did not provide a definition
 10 but simply told the jury to "use the everyday meaning" of the words. (Pet'rs Mem. P. & A. Supp. Pet.
 11 at 11-12; Lodgment No. 1, vol. 2 at 0194-95.) Ballard's jury was instructed on the crimes of second
 12 degree murder, which requires a finding of conscious disregard for human life, and involuntary
 13 manslaughter, which does not. (Lodgment No. 1, vol. 2 at 0178-79, 0188-89.) They were also instructed
 14 on the crime of assault on a child resulting in death, which requires the jury to find that the defendant
 15 willfully did an act, the natural and probable consequences of which were the death of a child. (*Id.* at
 16 0181-82.) The jury ultimately convicted Ballard of involuntary manslaughter and assault on a child
 17 resulting in death. (*Id.* at 0284-85.) Ballard argues the intent element of assault on a child resulting in
 18 death, a willful act, the natural and probable consequences of which are the death of a child, and second
 19 degree murder, conscious disregard for human life, are so similar that the jury would also have acquitted
 20 him of the assault on a child charge if they had been given the proper definition of "conscious disregard
 21 for human life." (Mem. P. & A. Supp. Pet. at 11-12.)

22 Respondent counters that the trial judge had no obligation to provide any definition of "conscious
 23 disregard for human life" because the California jury instructions used in this case do not provide any
 24 such definition. (Mem. P. & A. Supp. Answer at 9.) Even if such a definition existed, Respondent
 25 contends, Ballard would not be entitled to relief because there is no United States Supreme Court
 26 authority which requires a state court to instruct on anything other than the elements of the offense. (*Id.*)

27 An instructional error can form the basis for federal habeas corpus relief if it is shown that "the
 28 ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.'

1 [citation omitted].” *Murtishaw v. Woodford*, 255 F.3d 926, 971 (9th Cir. 2001) (citing *Cupp v.*
 2 *Naughten*, 414 U.S. 141, 146 (1973)); *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). The allegedly
 3 erroneous jury instruction cannot be judged in isolation, however. *Estelle v. McGuire*, 502 U.S. 62, 72
 4 (1991). Rather, it must be considered in the context of the entire trial record and the instructions as a
 5 whole. *Id.*

6 In California, “[s]econd degree murder is the unlawful killing of a human being with malice, but
 7 without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support
 8 a conviction of first degree murder.” *People v. Sarun Chun*, 45 Cal. 4th 1172, 1181 (2009) (internal
 9 citations omitted). Malice may be express or implied. *Id.* Ballard was prosecuted on a theory of implied
 10 malice. The California Supreme Court has explained the definition of implied malice as follows:

11 We have interpreted implied malice as having “both a physical and a mental component.
 12 The physical component is satisfied by the performance of ‘an act, the natural
 13 consequences of which are dangerous to life.’ (*People v. Watson* (1981) 30 Cal.3d 290,
 14 300[, 179 Cal.Rptr. 43, 637 P.2d 279].) The mental component is the requirement that
 15 the defendant ‘knows that his conduct endangers the life of another and ... acts with a
 16 conscious disregard for life.’ (*Ibid.*, internal quotation marks omitted.)” (*People v.*
 17 *Patterson* (1989) 49 Cal.3d 615, 626, 262 Cal.Rptr. 195, 778 P.2d 549 (lead opn. of
 18 Kennard, J.) (*Patterson*).)

19 *Sarun Chan*, 45 Cal. 4th at 1181.

20 With regard to this charge, the jury in Ballard’s case was instructed with Judicial Council of
 21 California Criminal Jury Instructions (CALCRIM), the criminal jury instructions which were approved
 22 as the official jury instructions in California in 2005, and not California Jury Instructions, Criminal
 23 (CALJIC) which were previously in use. CALCRIM defines second degree murder as follows:

24 To prove that the defendant is guilty of [second degree murder], the People must
 25 prove that:

- 26 1. The defendant committed an act that caused the death of another person; AND
- 27 2. When the defendant acted, he had a state of mind called malice
 28 aforethought; AND
- 29 3. He killed without lawful excuse or justification.

30 There are two kinds of malice aforethought, express malice and implied malice.
 31 Proof of either is sufficient to establish the state of mind required for murder.

32 The defendant acted with express malice if he unlawfully intended to kill.

33 The defendant acted with implied malice if:

- 1 1. He intentionally committed an act;
- 2 2. The natural and probable consequences of the act were dangerous to
- 3 human life; AND
- 4 3. At the time he acted, he knew his act was dangerous to human life;
- 5 AND
- 6 4. He deliberated acted with conscious disregard for human life.

7 Malice aforethought does not required hatred or ill will toward the victim. It is
 8 a mental state that must be formed before the act that causes death is committed. It does
 9 not require deliberation or the passage of any particular period of time.

10 An act causes death if the death is the direct, natural and probable consequence of
 11 the act and the death would not have happened without the act. A *natural and probable*
 12 *consequence* is one that a reasonable person would know is likely to happen if noting
 13 unusual intervenes. In deciding whether a consequence is natural and probable, consider
 14 all the circumstances established by the evidence.

15 There may be more than one cause of death. An act causes death only if it is a
 16 substantial factor in causing the death. A *substantial factor* is more than a trivial or
 17 remote factor. However, it does not need to be the only factor that causes the death.

18 (Lodgment No. 1, vol. 2 at 0187-88.)

19 The elements of the crime of assault on a child resulting in death, are: "(1) A person, having the
 20 care or custody of a child under the age of eight; (2) assaults this child; (3) by means of force that to a
 21 reasonable person would be likely to produce great bodily injury; (4) resulting in the child's death.

22 ///

23 *People v. Malfavon*, 102 Cal. App. 4th 727, 735 (2002) (internal citations omitted.) The jury was also
 24 properly instructed with regard to this crime, pursuant to CALCRIM No. 820:

25 To prove that the defendant is guilty of this crime, the People must prove that:

- 26 1. The defendant had care or custody of a child who was under the age of 8;
- 27 2. The defendant did an act that by its nature would directly and probably result in the
 28 application of force to the child;
- 29 3. The defendant did that act willfully;
- 30 4. The force used was likely to produce great bodily injury;
- 31 5. When the defendant acted, he was aware of the facts that would lead a reasonable
 32 person to realize that he act by its nature would directly and probably result in great
 33 bodily injury to the child;
- 34 6. When the defendant acted, he had the present ability to apply force likely to produce
 35 great bodily injury to the child; AND

1 7. The defendant's act caused the child's death.

2 Someone commits an act *willfully* when he or she does it willingly or on purpose.
 3 It is not required that he or she intend to break the law, hurt someone else or gain any
 4 advantage.

5 *Great bodily injury* means significant or substantial physical injury. It is an injury
 6 that is greater than minor or moderate harm.

7 An act *causes death* if:

8 1. The death was the natural and probable consequence of the act;
 9 2. The act was a direct and substantial factor in causing the death; AND
 10 3. The death would not have happened without the act.

11 A *natural and probable consequence* is one that a reasonable person would know
 12 is likely to happen if nothing unusual intervenes. In deciding whether a consequence is
 13 natural and probable, consider all of the circumstances established by the evidence.

14 A *substantial factor* is more than a trivial or remote factor.

15 However, it does not need to be the only factor that caused the death.

16 (Lodgment No. 1, vol. 2 at 0181-82; CALCRIM No. 820.)

17 Ballard contends that trial judge should have provided the jury with the definition of "conscious
 18 disregard for human life" contained in the CALJIC instructions when they sent their note asking for
 19 clarification of the phrase. (Mem. of P. & A. Supp. Pet. at 11-12.) He argues the verdicts are
 20 inconsistent because the jury acquitted him of second degree murder, which required them to conclude
 21 he did not act with implied malice, but convicted him of assault on a child causing death, which he
 22 claims has an equivalent mental state. (*Id.*) Had they been given the CALJIC definition, he claims the
 23 jury would not have convicted him of the assault on a child charge. (*Id.*)

24 The Court first observes that the instructions given to the jury on the murder and assault on a
 25 child causing death charge contain no errors. They accurately define the crimes and their elements under
 26 California law. This alone defeats Ballard's claim of instructional error. *See Estelle*, 502 U.S. at 72.

27 Further, while the mental states of the two crimes are similar, they are not the same. For second
 28 degree murder, implied malice requires a defendant to act with "conscious disregard for human life" and
 29 that the natural consequences of the act to be "dangerous to life." The crime of assault on a child causing
 30 death requires the defendant to act willfully and be aware that the natural and probable consequences

1 of the act to be “great bodily injury to the child,” but does not explicitly require a finding of “conscious
 2 disregard for human life.” (CALJIC No. 8.40; Lodgment No. 1, vol. 2 at 0181-82 (CALCRIM No. 820.)
 3 Moreover, CALJIC’s definition of “conscious disregard for life,” is “a killing [that] results from the
 4 doing of an intentional act, the natural consequences of which are dangerous to life, which act was
 5 deliberately performed by a person who knows that his or her conduct endangers the life of another and
 6 who acts with conscious disregard for life.” (CALJIC No. 8.40; *see also People v. Lima*, 118 Cal. App.
 7 4th 259, 265 (2004) (stating that “[a]ny act that is ‘‘fraught with grave and inherent danger to human
 8 life’’ is sufficient to establish that the defendant acted with conscious disregard for human life). There
 9 is no likelihood that the jury would have failed to convict Ballard of the assault on a child charge based
 10 on the definition of an element of the second degree murder charge. *See Estelle*, 502 U.S. at 72. Thus,
 11 even if there was instructional error, it did not “so infect[] the entire trial that the resulting conviction
 12 violates due process.’ [citation omitted].” *Murtishaw*, 255 F.3d at 971.

13 For the foregoing reasons, the Court concludes Ballard’s due process right were not violated by
 14 the state court’s decision not to define the term “conscious disregard for human life.” He is not entitled
 15 to relief as to this claim.

16 3. *Speedy Trial (Claim Two)*

17 Ballard argues in claim two that his right to a speedy trial was violated by repeated delays in his
 18 trial date. He also claims this violated his federal equal protection rights. (Pet. at 7; Mem. of P. & A.
 19 Supp. Pet. at 15.) Respondent counters that Ballard has not established any violation of his rights under
 20 the applicable federal law. (Mem. of P. & A. Supp. Answer at 9-12.)

21 “The Sixth Amendment guarantees that in all criminal prosecutions the accused shall enjoy the
 22 right to a speedy trial.” *Doggett v. United States*, 505 U.S. 647, 651 (1992); *United States v. Beamon*,
 23 992 F.2d 1009, 1012 (9th Cir. 1993). The Court must assess four factors in determining whether the
 24 right to a speedy trial has been violated: 1) the length of the delay; 2) the reason for the delay; 3)
 25 whether the defendant asserted the right; and 4) whether the defendant suffered prejudice as a result of
 26 the delay. *Doggett*, 505 U.S. at 651; *Barker v. Wingo*, 407 U.S. 514, 530 (1972). To trigger a speedy
 27 trial inquiry, the petitioner must show that the period between indictment and trial passes a threshold
 28 point of “presumptively prejudicial” delay. *Beamon*, 992 F.2d at 1012. Generally, a delay of about one

1 year has been found to be “presumptively prejudicial.” *Id.* at 1012-13. Only if this threshold is met,
 2 does a court proceed to analyze the rest of the *Barker* factors. *Beamon*, 992 F.2d at 1012. Ballard
 3 meets the threshold test, as the delay between the filing of charges, which occurred on February 16,
 4 2005, and the beginning of his trial, which occurred on April 6, 2006, was approximately fourteen
 5 months. (Lodgment No. 1, vol. 1 at 0001-03; Lodgment No. 2, vol. 1.) The Court must therefore
 6 “consider[] the extent to which the delay exceeds the threshold point in light of the degree of diligence
 7 by the government and acquiescence by the defendant to determine whether sufficient prejudice exists
 8 to warrant relief.” *Beamon*, 992 F.2d at 1012, citing *Doggett*, 505 U.S. at 651.

9 The delay in Ballard’s case was due in large part to requests by defense counsel and in each
 10 instance, Ballard agreed to the continuance. Ballard’s first court appearance was on February 16, 2005.
 11 (Lodgment No. 1, vol. 2 at 0244.) His arraignment was continued to March 2, 2005. Ballard agreed to
 12 this delay by waiving his state speedy trial rights. (*Id.*) On March 2, 2005, Ballard was arraigned; a
 13 readiness conference date of March 24, 2005 and a preliminary hearing date of March 30, 2005 were set.
 14 (*Id.* at 0245.) On March 24, 2005, the defense moved for a continuance. Ballard again agreed to the
 15 continuance by waiving his statutory time limits and the preliminary hearing was rescheduled for June
 16 1, 2005. (*Id.* at 0246.) On June 1, 2005, the defense was granted another continuance, Ballard again
 17 waived time and the preliminary hearing was rescheduled for July 12, 2005. (*Id.* at 0247.)

18 The preliminary hearing took place on July 12, 2005 and Ballard was held to answer. A
 19 readiness conference date was set for September 13, 2005 and a trial date was set for October 11, 2005.
 20 (*Id.* at 0249.) At the September 13 court appearance, the matter was continued for a further readiness
 21 conference to November 14, 2005 the trial date was re-set for January 9, 2006. Ballard agreed to this
 22 delay by waiving his statutory speedy trial rights. (*Id.* at 0251.) The court was advised on November
 23 14, 2005 that new counsel had been assigned to Ballard and that the readiness conference and the trial
 24 date would have to be moved. The readiness conference was re-set for December 5, 2005; the readiness
 25 date was further continued to December 12, 2005 when Ballard’s counsel was unavailable that day. (*Id.*
 26 at 0253-54.) At the December 12, 2005 court date, the jury trial was re-set for March 20, 2006 and
 27 Ballard again waived time. (*Id.* at 0255.) The trial date was re-set on March 10, 2006 for April 5, 2006,
 28 to which Ballard agreed. (*Id.* at 0257.) On April 5, 2006, the trial was re-set for the following day and

1 trial began on that day, April 6, 2006. (*Id.* at 0259.)

2 The record plainly indicates Ballard agreed to the vast majority of delays in his case. “Failure
 3 to assert the [speedy trial] right will make it difficult for a defendant to prove that he was denied a
 4 speedy trial.” *Barker*, 407 U.S. at 532; *see United States v. Sears Roebuck*, 877 F.2d 734, 740 (9th Cir.
 5 1989) (stating that “failure to assert [the] right to a speedy trial in a timely fashion . . . weighs heavily
 6 against dismissal”); *United States v. Simmons*, 536 F.2d 827, 831 (9th Cir. 1976) (holding that “failure
 7 to demand a speedy trial will make it difficult for [defendant] to prove that there was an abridgement
 8 of this guarantee”).

9 Finally, Ballard has shown no prejudice. Prejudice to a defendant must be viewed in light of the
 10 which the speedy trial was designed to protect. “The [Supreme] Court has identified three such interests:
 11 (1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and concern of the accused; and
 12 (3) to limit the possibility that the defense will be impaired.” *Barker*, 407 U.S. 532. Ballard simply
 13 states that the delay in bringing him to trial was without a “valid waiver” and that the delay prejudiced
 14 him. (Mem. of P. & A. Supp. Pet. at 15.) There has been no showing that Ballard’s pretrial
 15 incarceration was oppressive or that they delay resulted in any more “anxiety and concern” than a
 16 defendant would normally have experienced. Most importantly, Ballard has not provided any evidence
 17 that his defense was impaired in any way. For the foregoing reasons, the Court concludes Ballard’s
 18 federal speedy trial rights were not violated by the delay between his arrest and trial. He is not entitled
 19 to relief as to this claim.

20 Ballard’s equal protection claim is equally without merit. The Supreme Court has outlined the
 21 appropriate analysis for an equal protection claim:

22 The Equal Protection Clause of the Fourteenth Amendment commands that no State shall
 23 deny to any person within its jurisdiction the equal protection of the laws, which is
 24 essentially a direction that all persons similarly situated should be treated alike. *Plyler*
 25 *v. Doe*, 457 U.S. 202, 216 (1982). . . . The general rule is that legislation is presumed to
 26 be valid and will be sustained if the classification drawn by the statute is rationally
 27 related to a legitimate state interest. [citations omitted]. . . . The general rule gives way,
 28 however, when a statute classifies by race, alienage, or national origin. These factors are
 so seldom relevant to the achievement of any legitimate state interest that laws grounded
 in such considerations are deemed to reflect prejudice and antipathy—a view that those
 in the burdened class are not as worthy or deserving as others. For these reasons and
 because such discrimination is unlikely to be soon rectified by legislative means, these
 laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored
 to serve a compelling state interest. [citations omitted].

1 *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

2 Ballard has not established how he was treated differently from similarly situated individuals.
 3 Because he provides no factual basis for this claim, he is not entitled to relief. *See James v. Borg*, 24
 4 F.3d 20, 26 (9th Cir. 1994) (stating that “[c]onclusory allegations which are not supported by a statement
 5 of specific facts do not warrant habeas relief”).

6 4. *Actual Innocence/Exculpatory Evidence (Claim Four)*

7 Ballard alleges in claim four that information disclosed during trial and at his sentencing hearing
 8 was withheld from defense counsel in violation of his federal due process rights as delineated in *Brady*
 9 v. *Maryland*, 373 U.S. 83 (1963). Specifically, Ballard claims the prosecutor withheld information that
 10 the victim, Angel, had a fever and had been throwing up blood about three days before his death. Jose
 11 de Leon, Angel’s uncle, testified to this at trial. (Pet. at 9; Mem. of P. & A. Supp. Pet 12-14; Mem. of
 12 P. & A. Supp. Reply at 13-20.) Ballard also claims testimony at his sentencing hearing by the court-
 13 appointed advocate for the victim’s brother and sister that through therapy it had been discovered the
 14 victim’s sister, Estella, witnessed the murder, deprived him of a percipient and possibly exculpatory
 15 witness.² These two pieces of information, he claims, cast doubt on the validity of his conviction. He
 16 also asks for an evidentiary hearing on this claim. (Mem. of P. & A. Supp. Pet. at 1, 21.) Respondent
 17 counters that there was no *Brady* violation because the prosecutor did not suppress the information and
 18 that there was sufficient evidence presented at trial to establish his guilt. (Mem. of P. & A. Supp.
 19 Answer at 15-19.)

20 a. *Evidentiary Hearing*

21 Evidentiary hearings in 28 U.S.C. § 2254 cases are governed by the AEDPA, which
 22 “substantially restricts the district court’s discretion to grant an evidentiary hearing.” *Baja v. Ducharme*,
 23 187 F.3d 1075, 1077 (9th Cir. 1999). The provisions of 28 U.S.C. § 2254(e)(2) control this decision:

24 (2) If the applicant has failed to develop the factual basis of a claim in State court
 25 proceedings, the court shall not hold an evidentiary hearing on the claim unless the
 26 applicant shows that –

27 ² In his petition, Ballard also alleges that “during weekly psycho-therapy sessions it has been determined
 28 that 10-year-old Cesar Solar is the perpetrator of the crime of which petitioner is convicted.” (Pet. at 6.) This
 29 simply misstates the record. The court-appointed advocate testified that “It’s been determined that the 10-year-
 30 old without really extensive therapy *could grow up to be a perpetrator himself.*” (Lodgment No. 2, vol. 11 at
 31 1538.)

1 (A) the claim relies on –

2 (i) a new rule of constitutional law, made retroactive to cases on
 3 collateral review by the Supreme Court, that was previously unavailable;
 or

4 (ii) a factual predicate that could not have been previously
 5 discovered through the exercise of due diligence; and

6 (B) the facts underlying the claim would be sufficient to establish by clear and
 7 convincing evidence that but for the constitutional error, no reasonable factfinder would
 have found the applicant guilty of the underlying offense.

8 28 U.S.C. § 2254(e)(2).

9 The Ninth Circuit has outlined the procedure for district courts to follow in determining whether
 10 to grant a request for an evidentiary hearing. First, the Court must “determine whether a factual basis
 11 exists in the record to support the petitioner’s claim.” *Insyxiengmay v. Morgan*, 403 F.3d 657, 669-70
 12 (9th Cir. 2005) (citing *Baja*, 187 F.3d at 1078). If not, the Court must “ascertain whether the petitioner
 13 has ‘failed to develop the factual basis of the claim in State court.’” *Id.* A failure to develop the factual
 14 basis of a claim in state court implies “some lack of diligence, or some greater fault, attributable to the
 15 prisoner or the prisoner’s counsel.” *See Williams v. Taylor*, 529 U.S. 420, 432 (2000). The Supreme
 16 Court has said that “[d]iligence will require in the usual case that the prisoner, at a minimum, seek an
 17 evidentiary hearing in state court in the manner prescribed by state law.” *Id.* at 437. If the petitioner has
 18 failed to develop the factual basis for his claim in state court, “the court must deny a hearing unless the
 19 applicant establishes one of the two narrow exceptions set forth in section 2254(e)(2)(A) & (B).”
Insyxiengmay, 403 F.3d at 669-70.

20 If, however, the petitioner “has not ‘failed to develop’ the facts in state court, the district court
 21 may proceed to consider whether a hearing is appropriate, or required under *Townsend v. Sain*, 372 U.S.
 22 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963).” *Id.* *Townsend* identified six situations in which a habeas
 23 petitioner would be entitled to an evidentiary hearing:

24 (1) the merits of the factual dispute were not resolved in the state hearing; (2) the
 25 state factual determination is not fairly supported by the record; (3) the fact-finding
 26 procedure employed by the state court was not adequate to afford a full and fair hearing;
 (4) there is a substantial allegation of newly discovered evidence; (5) the material facts
 27 were not adequately developed at the state-court hearing; or (6) for any reason it appears
 that state trier of fact did not afford the habeas applicant a full and fair hearing.

28 *Townsend*, 372 U.S. at 313.

1 Thus, if a petitioner has not failed to develop the factual basis for his claim, he is entitled to an
 2 evidentiary hearing in federal court if he meets one of the *Townsend* factors and makes allegations
 3 which, if true, would entitle him to relief. *See Insyxiengmay*, 403 F.3d at 670; *see also Gonzalez v.*
 4 *Pliler*, 341 F.3d 897, 903 (9th Cir. 2003).

5 In the present case, a sufficient factual basis exists in the record to decide the claim. The trial
 6 transcripts and other records in this case provide enough information for the Court to resolve the merits
 7 of Ballard's claim. *See Insyxiengmay*, 403 F.3d at 669-70. Even if this were not so, Petitioner would
 8 not be entitled to an evidentiary hearing because he "failed to develop" his claim in state court. He did
 9 not request an evidentiary hearing on this claim in the habeas corpus petition he filed in the California
 10 Supreme Court. (*See* Lodgment Nos. 11, 13.) Accordingly, the Court recommends that Petitioner's
 11 request for an evidentiary hearing on his Brady claim be **DENIED**.

12 b. *Merits*

13 The Supreme Court held in *Brady v. Maryland*, 373 U.S. 83, 87 (1963) that due process requires
 14 a prosecutor to disclose all material evidence, including impeachment evidence, to the defendant. *Brady*,
 15 373 U.S. at 87; *United States v. Bagley*, 473 U.S. 667, 676, 678 (1985). In order to establish a *Brady*
 16 violation, Petitioner must show (1) the evidence was suppressed by the prosecution, either willfully or
 17 inadvertently; (2) the withheld evidence was exculpatory or impeachment material; and (3) he was
 18 prejudiced by the failure to disclose. *See Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *Benn v.*
 19 *Lambert*, 283 F.3d 1040, 1052-53 (9th Cir. 2002) (citing *Bagley*, 473 U.S. at 676, 678 and *United States*
 20 *v. Agurs*, 427 U.S. 97, 110 (1976).) "Evidence is deemed prejudicial, or material, only if it undermines
 21 confidence in the outcome of the trial." *Benn*, 283 F.3d at 1053 (citing *Bagley*, 473 U.S. at 676, *Agurs*,
 22 427 U.S. at 111-12). "Moreover, we analyze all of the suppressed evidence together, using the same type
 23 of analysis that we employ to determine prejudice in ineffective assistance of counsel cases." *Id.* (citing
 24 *Bagley*, 473 U.S. at 682 and *United States v. Shaffer*, 789 F.2d 682, 688-89 (9th Cir. 1986).)

25 Ballard has not established any of the elements of a successful *Brady* claim. First, there is no
 26 evidence the prosecution suppressed the information about Angel allegedly throwing up blood or Estrella
 27 witnessing Angel's death. As to the information about the victim throwing up blood in the days before
 28 his death, it is clear from the record that de Leon claimed this for the first time at trial:

1 [DEFENSE COUNSEL GREENSPAN]. How was he doing for those three days?

2 [DE LEON]. Uh, well, before I think — I think my sister told me that he was
3 throwing up blood or and he was throwing up.

4 Q. Throwing up blood?

5 A. Yes.

6 Q. When did she telling [sic] you that?

7 A. Huh?

8 Q. When did she tell you that?

9 A. When I was home. I was home and she told me.

10 Q. I know. I know. But when was this that he was throwing up blood, that day,
11 that morning before?

12 A. Oh, no, that was probably two days before.

13 Q. Two days before your sister told you that he was throwing up blood?

14 A. Yes.

15 Q. You didn't tell the police that, did you?

16 A. I just said he was throwing up.

17 Q. Why didn't you tell them he was throwing up blood?

18 MR. MECHALS: Objection. Misstates the testimony.

19 THE COURT: Overruled. You can answer that.

20 THE WITNESS: Uh, I don't know.

21 MR. GREENSPAN: As a matter of fact, you never told anybody that he was
22 throwing up blood until today, right?

23 A. Yes.

24 (Lodgment No. 2, vol. 2 at 385-86.)

25 The record also definitively establishes the prosecutor learned the information about Estrella
26 witnessing Angel's death when the court-appointed advocate testified to it during Ballard's sentencing
27 hearing. After hearing the advocate state that "[t]hrough therapy, they [have] now learned that the 4-
28 year-old little girl witnessed the murder and she is having a very difficult time. . . .," the prosecutor told
the court that "[in] terms of the information regarding [Estrella], I don't have any information to relay

1 to the court on that [as] I heard the comment as it was being said.” (Lodgment No. 2, vol. 11 at 1538,
 2 1547-48.)

3 Ballard has also not established that the evidence was exculpatory. *See Strickler*, 527 U.S. at
 4 281-82. Evidence that Angel was throwing up blood in the days before his death may have indicated
 5 that he was suffering from some medical condition or injury before he died, but it does not in any way
 6 help establish that Ballard did not inflict the injuries on Angel that led to his death. Nor does the fact
 7 that Estrella may have witnessed Angel’s death, since there is no evidence that she would have named
 8 anyone other than Ballard as the person who killed Angel.

9 Finally, Ballard has not established that the evidence Ballard alleges was suppressed was material
 10 or that he was prejudiced by its suppression. *Strickler*, 527 U.S. at 281-82. Extensive, persuasive
 11 evidence was presented at trial indicating that Angel was the victim of a violent physical attack that
 12 caused his death while he was in Ballard’s care and that Ballard’s explanation of how Angel was injured
 13 was inconsistent with his injuries. (Lodgment No. 2, vol. 2 at 448-77, vol 4 at 587-659 [testimony of
 14 Dr. Sandy Murray]; vol. 3 at 549-53 [testimony of Deputy Bustamante]; 553-83 [testimony of Deputy
 15 Nares]; vol 6 at 947-64 [testimony of Deputy Sobecki]; vol 7 at 1073-1177 [testimony of Dr. Christina
 16 Stanley].) In addition, Cesar Solar, Angel’s brother, testified that after being sent to his room by Ballard
 17 for answering the phone, he heard Angel crying, the sound of hitting and Ballard’s voice. (Lodgment
 18 No. 2, vol. 7 at 1035-39, 1067.) And, Detective Nares testified that Jose de Leon told him that Ballard
 19 admitted hitting Angel on the night of the incident but he did not know how hard. (Lodgment No. 2, vol.
 20 7 at 1192.) Analyzing the allegedly suppressed evidence together, as the Court is required to do under
 21 *Benn*, the Court concludes the evidence is not “material” because it does not “undermine[] confidence
 22 in the outcome of the trial.” *Benn*, 283 F.3d at 1053 (citing *Bagley*, 473 U.S. at 676, *Agurs*, 427 U.S.
 23 at 111-12).

24 For all the foregoing reasons, Ballard is not entitled to relief as to this claim.

25 4. *Shackling (Claim Three)*

26 In claim three, Ballard argues his federal due process rights to a fair trial were violated when
 27 jurors saw him shackled during the trial. (Pet. at 8; Mem. P .& A. Supp. Pet at 16-20.) Respondent
 28 counters that the claim is procedurally defaulted. In the alternative, Respondent argues that the state

1 courts resolution of this claim was neither contrary to, nor an unreasonable application of clearly
 2 established Supreme Court law. (Answer at 6; Mem. P. & A. Supp. Answer at 12-15.)

3 Ballard raised this claim in the petition for review he filed in California Supreme Court.
 4 (Lodgment No. 7.) Because that court denied the petition for review without citation of authority, this
 5 Court must “look through” to the state appellate court’s opinion as the basis for its analysis. *Ylst*, 501
 6 U.S. at 801-06. The appellate court declined to address the shackling claim on the merits because it
 7 determined that “any right to challenge the use of the ankle restraint was forfeited by defense counsel’s
 8 failure at trial to object” *People v. Ballard*, 2007 WL 1600386, slip op. (Cal. Ct. App. 2007) at *2.
 9 Although Respondent asserts the claim is procedurally defaulted, he has not asserted that the procedural
 10 bar that was imposed is independent and adequate and therefore has not met his initial burden under
 11 *Bennett*. See *Bennett*, 322 F.3d at 586. Because the state court did not address the merits of this claim
 12 due to a procedural bar, and Respondent has not, the Court must conduct a de novo review of the claim.
 13 *Pirtle v. Morgan*, 313 F.3d 1160, 1167-68 (9th Cir. 2002).

14 “A criminal defendant has a constitutional right to be free of shackles and handcuffs in the
 15 presence of the jury absent an essential state interest that justifies the physical restraints.” *Williams v.*
 16 *Woodford*, 384 F.3d 567, 591 (9th Cir. 2004) (citing *Ghent v. Woodford*, 279 F.3d 1121, 1132 (9th
 17 Cir. 2002) and *Rhoden v. Rowland*, 172 F.3d 633, 636 (9th Cir. 1999)). A shackling claim brought on
 18 federal habeas review, however, is subject to harmless error analysis under *Brech v. Abrahamson*, 507
 19 U.S. 619, 623 (1993) which requires the Court to determine whether the shackling had a substantial and
 20 injurious effect on the verdict. *Duckett v. Godinez*, 67 F.3d 734, 749 (9th Cir. 1995); *Castillo v. Stainer*,
 21 983 F.2d 145, 148 (9th Cir. 1992), amended by 997 F.2d 669 (9th Cir. 1993).

22 Ballard has not established he suffered any prejudice. In the first instance, there is no evidence
 23 in the record that the jury ever saw Ballard in shackles. In fact, the only evidence in the record with
 24 regard to Ballard’s shackles is a conversation between defense counsel, the prosecutor and the trial judge
 25 regarding whether to give a jury instruction directing the jury to disregard the shackles. The
 26 conversation establishes that no one thought the jury could see the shackles:

27 THE COURT: Okay, 204 [the shackling instruction]. Do you want that given?
 28 I don’t think it’s even that obvious at all.

MR. GREENSPAN: I don’t think it’s obvious at all.

1 THE COURT: I don't either.

2 MR. GREENSPAN: I wouldn't be asking for it.

3 THE COURT: Okay. Yeah, we've got a skirt all the way around. 204, for the
4 record, is defendant's restraints. And he has — his hands have not been restrained, it's
only been by the ankle underneath the table with a skirt. I don't think it's visible to
anybody.

5 MR. GREENSPAN: Right.

6 THE COURT: So — and Mr. Greenspan doesn't want to emphasize that fact, so
7 we're not going to give it.

8 (Lodgment No. 2, vol. 5 at 830-31.)

9 There is simply no evidence that the outcome of Ballard's trial was affected in any way by his
10 shackling. Accordingly, the state court's resolution of this claim was neither contrary to, nor an
11 unreasonable application of, clearly established Supreme Court law. *Williams*, 529 U.S.A. at 412-13.
12 Brown is not entitled to relief as to this claim.

13 **V. CONCLUSION AND RECOMMENDATION**

14 The Court submits this Report and Recommendation to Chief United States District Judge Irma
15 E Gonzalez under 28 U.S.C. § 636(b)(1) and Local Civil Rule HC.2 of the United States District Court
16 for the Southern District of California. For the reasons outlined above, **IT IS HEREBY**
17 **RECOMMENDED** that the Court issue an Order: (1) approving and adopting this Report and
18 Recommendation, and (2) directing that Judgment be entered denying the Petition and denying the
19 request for an evidentiary hearing.

20 **IT IS ORDERED** that no later than February 4, 2010, any party to this action may file written
21 objections with the Court and serve a copy on all parties. The document should be captioned
22 "Objections to Report and Recommendation."

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1 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with the Court and
2 served on all parties no later than **February 18, 2010**. The parties are advised that failure to file
3 objections within the specified time may waive the right to raise those objections on appeal of the
4 Court's order. *See Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d
5 1153, 1156 (9th Cir. 1991).

DATED: January 5, 2010



CATHY ANN BENCIVENGO
United States Magistrate Judge